BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

CHARLES L. HEITZ, Claimant, v. JOHN STEPHENSON, Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	)	**IC 02-007593** **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** FILED AUG 15 2005

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise, Idaho on March 15, 2005. Richard K. Dredge represented Claimant. Kenneth L. Mallea represented ISIF. (Employer and Surety settled with Claimant before hearing.) The parties at hearing presented oral and documentary evidence. They submitted briefs. The case came under advisement on June 20, 2005, and is now ready for decision.

ISSUE

After notice and as agreed upon by the parties at hearing, the issue to be resolved is whether ISIF is liable under Idaho Code § 72-332.

CONTENTIONS OF THE PARTIES

Claimant asserts he sustained a work-related injury on April 3, 2002, while working as a mail-truck driver. He now can no longer do the required repetitions of shifting. He went from being able to find part-time trucking jobs to being totally and permanently disabled. The conditions for establishing ISIF liability are present.

ISIF acknowledges Claimant had a work-related accident. Defendant argues alternatively that Claimant was no more disabled after the accident than before it, was totally and permanently disabled prior to the accident, or is unable to show the qualifying elements for ISIF liability are present.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant; Leroy H. Barton, III, M.Ed., C.R.C.; and Nancy J. Collins, Ph.D.; and,

2. Joint Exhibits A-FF admitted at hearing.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

The accident and medical care

1. On the date of the accident, Claimant was 66 years of age. He earned a G.E.D. Claimant drove truck for approximately 18 years, beginning in 1973.

2. Claimant worked for Employer delivering mail between the main post office and local offices. He drove a diesel truck. This was a part-time job. On April 3, 2002, his second day working for Employer, Claimant tripped over a ramp striking his head and right elbow

against a cement wall. Claimant tried to work the next day. Employer fired him.

3. The first doctor that Claimant saw relating to his accident was James F. Thomson, M.D., his family doctor. On April 25, 2002 Dr. Thomson noted Claimant showed a "considerable contusion" on his scalp, had right neck pain, and "bruised his right elbow a bit." An x-ray taken that day showed advanced degenerative disease in the mid and lower cervical spine. On May 13, Dr. Thomson indicated that Claimant's "neck injury" precluded work, and he ordered physical therapy. On May 20, Claimant reported he "developed numbness in his fingers about 6 days ago."

4. Having referred Claimant to neurologist Lawrence E. Green, M.D., and orthopedist George Nicola, M.D., Dr. Thomson also continued to treat Claimant. In December 2002, in a response to correspondence from Claimant's attorney, Dr. Thomson opined:

> I do believe that [Claimant] at least aggravated or perhaps caused his ulnar nerve problems with his work related injury.
>
> [Claimant's] lawyer recently sent 88 pages of AMA guide to evaluation of permanent impairment. However, though I believe Claimant's ulnar nerve injury is work related, I still will not do my first permanent impairment rating on him.

5. Dr. Green first saw Claimant on May 28, 2002. After an EMG and MRI Dr. Green opined, "I do not find anything directly related to his trauma [the April 3, 2002 accident] that would keep him from returning to work or at least looking for part-time work; and I would not expect him to be left with any permanent physical impairment as a result of his injury."

6. Although Dr. Nicola had previously treated Claimant for a torn left rotator cuff and left knee pain, Claimant saw him for this work-related accident on August 13, 2002. After some treatment including cubital tunnel injections, Dr. Nicola reported he expected Claimant

eventually could return to his pre-injury job as truck driver. On August 27, 2002, Dr. Nicola indicated Claimant could perform modified work with limitations of no forceful grasping and no heavy lifting greater than 35 pounds.

7. On October 3, 2002, Dr. Nicola opined Claimant medically stable as of September 24, 2002, and without permanent impairment.

8. On November 26, 2002, Dr. Nicola noted Claimant linked the numbness and tingling in his fourth and fifth digits of his right hand to the accident. Dr. Nicola continued, "I cannot directly explain that, but he does appear to have an ulnar nerve lesion."

9. In December 2002, Dr. Green opined:

> [Claimant's right hand] shows chronic denervation changes in the ulnar distribution compatible with early tardy ulnar palsy. Unless he had significant direct trauma to the right elbow, I think this is a chronic condition and probably has little to with his previous neck injury in April.

10. On December 31, 2002, Dr. Nicola noted a discussion with Dr. Thomson. As a result, Dr. Nicola noted he "would probably tend to agree with" Dr. Thomson's opinion that Claimant's ulnar neuritis was related to the accident. Dr. Nicola recommended surgery.

11. On February 11, 2003, Dr. Nicola performed surgery, a release of the right ulnar nerve. On February 18, he released Claimant to light-duty work, left-hand only. Gradually, restrictions were lifted.

12. Because of lingering complaints, Dr. Green retested Claimant on June 16, 2003. Claimant showed improved right ulnar nerve conduction compared to December 10, 2002.

13. On August 5, 2003, Dr. Nicola found Claimant to be fixed and stable. Dr. Nicola opined Claimant suffered a 7% upper extremity impairment; 4% whole person with 50% pre-existing which resulted in a net 2% PPI rating. On April 20, 2004, Dr. Nicola defined

Claimant's permanent restrictions as precluding truck driving and no pushing or pulling over 100 pounds. On February 9, 2005, Dr. Nicola further clarified that Claimant could push mail carts, the heaviest part of his job at the time of the accident.

14. On November 10, 2004, George R. Lyons, M.D., examined Claimant at Surety's request. He opined Claimant "likely has a pre-existing ulnar neuropathy that may possibly have been aggravated by the injury. He had a cervical strain at the time of the injury as well. His examination is inconsistent in this regard." He opined Claimant stable and without additional work restrictions related to the accident.

15. At hearing, Claimant testified to continuing sensation difficulties in his fourth and fifth fingers. He testified operating vehicles with manual transmissions was too difficult.

Prior medical conditions

16. Claimant has suffered numerous pre-existing medical conditions and previous work-related accidents, including: Still's disease; rotator cuff surgery; left knee arthritis; multiple back surgeries for herniated disks; and kidney stones. Claimant has taken Rimactane for his Still's disease. The medication has improved his functioning.

17. Prior to his April 2002 work-related accident, Claimant saw Dr. Thomson many times for many different conditions, significantly including intermittent swelling or tingling in his hands as early as 1996 with carpal tunnel surgery having been performed.

18. Claimant began receiving Social Security disability benefits in 1994 effective retroactively to October 1990. In a letter dated October 25, 1991, Dr. Thomson opined on Claimant's behalf to the Social Security Administration that Claimant's "back problem precludes him from working despite excellent continued attempts at a variety of jobs".

19. Claimant understood he could work up until a certain amount without jeopardizing his Social Security benefits but could not specify the exact amount. Claimant worked as follows: 1990 and 1991 driving a Mack truck for Idaho Sand and Gravel, earning around $4,000 per year; 1994 mowing lawns spring, summer and fall, working between 25 and 40 hours per week and earning around $2,000; 1995 and 1996 driving school bus for Emmett School District, earning around $4,100 and $2,241 respectively; 1997 and 1998 working as a janitor for Western Building Maintenance, earning about $679.50 and $492 respectively.

20. Claimant testified he received an inheritance in May of 1991 which included an initial lump sum, monthly payments until March 2000, and a final lump sum then. He testified he sought only part-time work since about 1990 and has not worked since the accident.

Prior impairment and restrictions

21. In 1982, Claimant underwent an L4-5 laminectomy which in 1985 was rated as a 17.5% impairment. A 1985 left shoulder rotator cuff surgery resulted in a 12% PPI. Additional back surgery in 1988 produced an additional 5% PPI.

22. In 1987, Joseph G. Daines, Jr., M.D., opined Claimant was unable to work as a truck driver as a result of both his back and shoulder. Despite opining functional overlay was present, Dr. Daines provided additional lifting and body movement restrictions.

23. Claimant returned to trucking. In 1989, neurologist Richard W. Wilson, M.D., opined Claimant could return to work as a truck driver but restricted him from heavy lifting and lumping loads.

24. In 1998, orthopedist Michael P. Naeve, M.D., opined Claimant's left knee condition allowed a return to work with lifting and body movement restrictions.

Disability evaluations

25. Rehabilitation counselor Leroy H. Barton was initially retained by Employer and Surety. He opined Claimant was given no new restrictions as a result of the accident and suffered no additional loss of access to the labor market. He opined Claimant suffered no permanent disability in excess of impairment. He equivocated about whether Claimant was totally and permanently disabled.

26. Rehabilitation counselor Nancy J. Collins, Ph.D., was retained by ISIF. She opined Claimant's restrictions related to the accident "[do] not contribute to his disability status." She opined his work at the time of injury did not constitute competitive employment in a full-time position. Dr. Collins equivocated about how or whether part-time employment counts for purposes of a disability analysis.

Discussion and further findings

27. Idaho Code § 72-332 (1) provides in pertinent part that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his or her employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his or her income benefits out of the ISIF account.

28. Idaho Code § 72-332 (2) further provides that "permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such

seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

29. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court set forth four requirements a claimant must meet in order to establish ISIF liability under Idaho Code § 72-332:

(1) Whether there was indeed a pre-existing impairment;

(2) Whether that impairment was manifest;

(3) Whether the alleged impairment was a subjective hindrance; and

(4) Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

30. Here, assuming the first three requirements have been met, Claimant has not shown the last requirement has been satisfied.

31. In order to establish disability in excess of his impairment, claimant must prove by a preponderance of the evidence, that he sustained a loss of earning capacity or a reduced ability to engage in gainful activity. Ball v. Daw Forest Products Company, 136 Idaho 155, 30 P.3d 933 (2001). Appropriate consideration in making a total disability finding includes both medical and nonmedical factors, such as age, gender, education, training, usable skills, and economic and social environment.

32. Mr. Barton, vocational rehabilitation counselor, persuasively opined Claimant has not sustained any disability in excess of impairment from the April 2002 injury. He asserted Claimant has not suffered from reduced access to the labor market; indeed, Claimant is able to return to his time-of-injury job.

33. Mr. Barton was not alone in his view. Significantly, Dr. Collins also stated that the April 2002 work-related accident did not contribute to Claimant's disability. Dr. Collins did opine Claimant was totally disabled prior to his 2002 accident because of his inability to be employed in a *full-time* job.

34. Idaho Code § 72-425 when addressing "gainful activity" does not distinguish between full- and part-time work. It is not useful to set forth a treatise about when and how to assess part-time employment. As explained more fully below, given the facts of this case, Claimant was totally and permanently disabled from full-time work well before the accident, perhaps as early as 1990. He was neither totally and permanently disabled from part-time work before the accident, nor as a result of the accident, nor as a result of the combined effects of the accident and pre-existing impairments.

35. There was medical consensus as regards Claimant's ability to work. Drs. Nicola, Green, Thomson and Lyons all provided opinions which preclude a medical basis for an award of disability in excess of impairment.

36. Furthermore, other social and economic factors come into play. Claimant has clearly indicated he only wants to work part-time. Claimant has chosen his prior work situations in accordance with his varying sources of income, i.e., inheritance moneys and disability benefits.

37. Industrial Commission Rehabilitation Division (ICRD) records show Claimant fails to meet criteria for total permanent disability under an odd-lot analysis. ICRD consultant Sandy Baskett's case notes indicate Claimant was minimally cooperative in a job search. Claimant failed to show a job search would be futile. Indeed, since 1991 he has sought and found employment consistent with his restrictions and desires. Claimant has not attempted to work since his April 2002 accident. He has not shown a job search would be futile.

38. ISIF argues Claimant cannot meet the combined effects or "but for" test. The test is whether, but for the work-related accident, the worker would not have been totally and permanently disabled immediately following the occurrence of that injury. Bybee v. State, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996).

39. This is a persuasive, even compelling, argument. Here, Claimant's prior injuries did not combine with his recent injury to create total and permanent disability because Claimant is neither 100% permanently and totally disabled nor an odd-lot worker. Claimant's work-related accident of April 2002 – with its 2% PPI rating and no additional disability – has left Claimant in essentially the *same position* he was in prior to April 2002. The accident caused no disability above the rated impairment.

40. Claimant has not presented medical factors to support his claim. Work restrictions related to the accident are less than or redundant to prior work restrictions. The subjective sensation changes in his fingers do not preclude any physical function. His avoidance of shifting gears is completely subjective and doing so has not been claimed to risk further harm or injury.

41. Non-medical factors are not persuasive. He was only slightly more than one day

older at the time of accident than he was when he began working the job. No other non-medical factors apply to support additional disability.

42. Claimant failed to show the 2% PPI suffered as a result of the subject accident combines with pre-existing disability to render him totally and permanently disabled.

CONCLUSION OF LAW

The Industrial Special Indemnity Fund is not liable under Idaho Code § 72-332.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusion of Law as its own and issue an appropriate final order.

DATED this 4TH day of August, 2005.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 15TH day of AUGUST, 2005, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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